

DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
941 North Capitol Street, NE Suite 9100
Washington, DC 20002
TEL: (202) 442-8167
FAX: (202) 442-9451

E. T.¹

Appellant/Claimant

v.

M.S., INC.

Appellee/Employer

Case No.: ES-P-07-107593

FINAL ORDER

I. INTRODUCTION

On June 15, 2007, Appellant/Claimant E. T. filed an appeal of a Claims Examiner's Determination, served May 23, 2007, holding Claimant ineligible for benefits. The appeal raises the issue whether Claimant voluntarily left her most recent work without good cause connected with the work, as specified in the District of Columbia Unemployment Compensation Act and the applicable rules, D.C. Official Code § 51-110(a); 7 District of Columbia Municipal Regulations ("DCMR") 311.

This administrative court issued a Scheduling Order and Notice of In-Person Hearing on July 11, 2007, scheduling the hearing for July 31, 2007, at 10:30 a.m. Appellee/Employer M.S., Inc., Inc. ("M.S., Inc.") was represented by its Executive Vice President, E. H. T. B., Office Manager for A., Inc., testified on behalf of M.S., Inc. Claimant appeared over the telephone as

¹ Claimant was initially identified as "E. T." by this administrative court. Her correct name is "E. T." and the caption has been changed to properly reflect Claimant's name.

she currently resides in Kentucky. Claimant represented herself and testified at the hearing. I admitted into evidence Court records 300 and 301 to assess jurisdiction.

II. FINDINGS OF FACT

1. On June 15, 2007, Claimant filed an appeal of the Claims Examiner's Determination, certified as served on May 23, 2007, holding Claimant ineligible for benefits.² Exhibits 300-301. At the time the Determination was served on Claimant, she was in Richmond, VA, helping care for her sick mother. When the Determination arrived at Claimant's residence in Ohio (which was Claimant's then-current address), Claimant's son called Claimant in Virginia to explain that the Claims Examiner's Determination had been received. Within ten days of service of the Determination, Claimant called the D.C. Department of Employment ("DOES") to explain her circumstances (being in Virginia caring for her mother), and was told to file the appeal when she returned to Ohio. The DOES representative instructed Claimant to submit a letter explaining the delay and that it would be "okay." The DOES representative justified this conclusion by noting that Claimant could not file an appeal request while Claimant was in Virginia, because she required the Determination, which was in Ohio. Claimant returned to Ohio on June 6, 2007, and filed her appeal on June 15, 2007.

2. M.S., Inc. is co-contractor with A., Inc. at the W. C. C. A., Inc. provides human resources and financial services to M.S., Inc. Claimant worked for M.S., Inc. from October 1, 2004, until March 17, 2007. At the time of her separation from M.S., Inc., Claimant was a full-time Carpet Technician and earned \$14.92 per hour.

² Nothing in the record below indicates any issue has been raised or preserved concerning factors under D.C. Official Code § 51-109; *e.g.*, base period eligibility, availability for work.

3. After returning from vacation in June 2006, Claimant's pay check was short approximately \$300. At the time, Claimant's average, net pay check (when properly reflecting the hours she actually worked) was approximately \$700. Between June 2006, and the time of her resignation, Claimant's paycheck was short over fifteen times; these shortages included, but were not limited to, the amounts she earned during her vacation in June 2006, December 29, 2006, January 1, 10, and 22, 2007, as well as February 8, 2007. Claimant and other employees regularly did not get a correct paycheck from M.S., INC. The discrepancies in Claimant's pay totaled thousands of dollars.

4. Claimant repeatedly worked with "Courtney," who was the A., Inc., Office Manager. As Office Manager, Courtney was responsible for M.S., Inc. employee pay. In February 2007, Claimant wrote M. C., A., Inc. General Manager, a letter complaining about delays in getting her pay as well as the stumbling blocks Courtney created as she tried to "rectify" the situation. Mr. C. did not resolve the problem. Claimant resigned out of frustration with the delays in receipt of her pay in March 2007, effective March 17, 2007.

5. On or about March 21, 2007, (after Claimant left M.S., Inc.), Claimant's union representative met with T. B., Office Manager (Ms. B. replaced Courtney). It was determined by management at that time that Claimant was still owed sixteen hours of pay. Claimant did not receive the check for these hours until July 27, 2007.

III. DISCUSSION AND CONCLUSIONS OF LAW

Any party may file an appeal from a Claims Examiner's Determination within ten calendar days after the mailing of the Determination to the party's last-known address or, in the absence of such a mailing, within 10 calendar days of actual delivery of the Determination. D.C.

Official Code § 51-111(b). This administrative court must adhere to these limits and is without authority to waive them. *Gosch v. D.C. Dep't of Employment Servs.*, 484 A.2d 956, 957 (D.C. 1984) (holding no jurisdiction to consider an appeal where the time prescribed for filing has expired and noting that the Supreme Court has approved even shorter time limits in the face of due process challenges). The appellant – in this case, Claimant – bears the burden of proving that this administrative court has jurisdiction to hear the appeal.

If proper notice has been provided, the “ten day period for . . . appeals under the Unemployment Compensation Act . . . is jurisdictional, and failure to file within the period prescribed divests [an administrative tribunal] of jurisdiction to hear the appeal.” *Lundahl v. D.C. Dep't of Employment Servs.*, 596 A.2d 1001 (D.C. 1991) (internal citations omitted); *Gaskins v. D.C. Unemployment Comp. Bd.*, 315 A.2d 567 (D.C. 1974) (no jurisdiction to consider an untimely appeal even where notice of claims determination was received by appellant in aftermath of death in family). Appellate jurisdictional requirements cannot be waived. *Customers Parking, Inc. v. District of Columbia*, 562 A.2d 651, 654 (D.C. 1989).

Claimant did not challenge the authenticity of the Claims Examiner's certification and acknowledges that DOES mailed the Determination to her correct address. In this jurisdiction, a certificate of service is proof of a mailing date and address, unless the certification is rebutted by reliable evidence. *D.C. Pub. Employee Relations Bd. v. D.C. Metro. Police Dep't*, 593 A.2d 641, 643 (D.C. 1991), citing *Thomas v. D.C. Dep't of Employment Servs.*, 490 A.2d 1162, 1164 (D.C. 1985). I conclude that the Claims Examiner mailed the Determination to Claimant's last-known address on May 23, 2007. The deadline for Claimant's filing of a notice of appeal was therefore June 4, 2007, unless the record shows that the notice of appeal rights provided to Claimant was flawed as a matter of law or some other exception applies.

Claimant offered forthright and credible testimony about her receipt of the Claims Examiner's Determination and her subsequent communications with DOES. I accept as true Claimant's assertion that she reasonably sought advice from DOES and spoke to a representative who instructed her to file the appeal after Claimant returned home to Ohio with a letter explaining her situation. The DOES representative explained that this was the proper course of action because Claimant was in Virginia while the Claims Examiner's Determination was at Claimant's home in Ohio. Given that Claimant required the Determination in order to perfect her appeal, the DOES official explained, Claimant had no choice but to wait until she returned to Ohio. The DOES representative told Claimant this would be "okay." In light of these facts, I have to consider whether Claimant's failure to file an appeal by June 4, 2007, arose from the DOES official's comments, thereby rendering Claimant's notice of appeal rights legally ambiguous. The District of Columbia Court of Appeals has recognized that "'an ambiguous notice is inadequate as a matter of law to trigger the operation of the statutory time limitations within which to file an . . . appeal'" from a Claims Examiner's Determination. *Calhoun v. Wackenhut Servs.*, 904 A.2d 343, 345 (D.C. 2006), quoting *Lundahl v. D.C. Dep't of Employment Servs.*, 596 A.2d 1001, 1003 (D.C. 1991). The court has specifically held that a notice of appeal rights may become ambiguous and, therefore, inadequate, when government officials provide conflicting or confusing information to parties orally or in writing. See *Calhoun* 904 A.2d at 345-346; *Selk v. D.C. Dep't of Employment Servs.*, 497 A.2d 1056, 1058 (D.C. 1985).

Based on the record as a whole, I conclude Claimant received ambiguous notice of her appeal rights. Claimant recalled in detail her conversation with the DOES official to whom she spoke after receiving the Determination. Claimant's testimony on this point was credible.

Claimant testified that she filed her appeal upon her return to Ohio, because the DOES official told her to do so. The record establishes that the misunderstanding regarding when Claimant had to file her appeal was grounded solely in the statements made by the DOES representative concerning how to perfect her appeal.

Claimant returned home on June 6, 2007, actually received the Determination that day, and filed her notice of appeal on June 15, 2007. I therefore find that Claimant's notice of appeal was filed within the statutory ten-calendar-day deadline imposed under the Act. D.C. Official Code §51-111(b). Claimant's appeal was therefore timely and jurisdiction is established.

If an employee voluntarily leaves her most recent work without good cause connected to the work, the employee is disqualified from receiving benefits. D.C. Official Code § 51-110(a). The burden is upon the employer to show that the employee voluntarily left work. OAH Rule 2820.3 (burden of production on party arguing an exception to a statutory requirement); *Green v. D.C. Dep't of Employment Servs.*, 499 A.2d 870, 876 (D.C. 1985).

An employee may offer testimony or documents confirming that he or she voluntarily quit. Such testimony, if credited, can be sufficient to satisfy the employer's burden of production and, perhaps, persuasion. Thus, under current law, "[l]eaving is presumed to be involuntary unless the claimant admits (or the employer establishes) that it was voluntary. . . . The test of voluntariness is whether it appears from all of the circumstances that an employee's departure was 'voluntary in fact, within the ordinary meaning of the word "voluntary."'" *Cruz v. D.C. Dep't of Employment Servs.*, 633 A.2d 66, 69-70 (D.C. 1993) (internal citations omitted).

If it is established that an employee's departure is voluntary, that employee may still be eligible for unemployment compensation benefits if she can demonstrate "good cause connected

with the work” for leaving. 7 DCMR 311.4. The determination of “good cause connected with the work” “is factual in nature, and turns on what ‘a reasonable and prudent person in the labor market’ would do under similar circumstances.” *Cruz*, 633 A.2d at 70 (quoting 7 DCMR 311.5).

Thus, the question before this administrative court is whether Claimant voluntarily quit and if so, whether she had good cause connected with her work. M.S., Inc. and Claimant agree that Claimant voluntarily quit her job. She was neither forced out, nor was she asked to leave. Therefore, this administrative court concludes that Claimant’s decision to leave her job was voluntary within the meaning of the governing regulations. 7 DCMR 311. The remaining question is whether Claimant had good cause connected with the work for her voluntary leaving. *See* 7 DCMR 311.6 – 311.7; D.C. Official Code § 51-110.

Claimant testified consistent with the above-stated findings of fact. M.S., Inc. did not dispute Claimant’s testimony regarding the frequency with which she was underpaid or the amount of late pay. I find Claimant’s testimony to be credible, in part, because it is corroborated by the testimony of Ms. B., who acknowledged that after Claimant had resigned Ms. B. still had to prepare a check for monies owed to Claimant due to M.S., Inc.’s failure to pay Claimant timely the full amount she was due.

The governing regulations recognize good cause as including “failure to provide remuneration for employee services.” 7 DCMR 311.7 (c). Reasons that are not good cause include a “minor reduction in wages.” 7 DCMR 311.6 (b). The District of Columbia Court of Appeals has not addressed the question at issue here – whether an employer’s regular and repeated untimely payment of wages provides “good cause connected with the work” for an employee voluntarily leaving his job, thereby making him eligible for unemployment

compensation benefits. D.C. Official Code § 51-110 (a); 7 DCMR 311.4. However, cases from other jurisdictions are instructive.

While few courts have addressed the issue directly, the weight of authority appears to be that when an employer consistently fails to provide paychecks to his or her employee on established paydays, the employee has good cause to voluntarily quit employment for purposes of eligibility for unemployment benefits. In *Emgee Eng'g Co. v. Unemployment Comp. Bd. of Review, Commw. of Pennsylvania*, 373 A.2d 779 (Pa. Commw. Ct. 1977), for example, the Court affirmed the Pennsylvania Unemployment Compensation Board of Review's finding that an employer who paid an employee late three times (two, three and five days late) during a four-month period provided "cause of a necessitous and compelling nature" for the employee quitting his job. The court rejected the employer's argument that the tardiness of the salary payments was attributed to problems with its cash flow and articulated the rationale for its holding as follows:

[W]e must note that for nearly a decade we have been living in what may be called 'The American Age of Inflation and Credit.' Many, if not most, of our citizens tread the tightrope between paydays maintaining a precarious balance between the ever increasing prices for what we buy today and the debts we incurred for our purchases of yesterday. We believe it too much to add to the employee's [sic] burden of balancing his budget and paying his debts when they come due the task of accommodating his financial management to the management problems of his employer.

Id. at 782; accord *Fekos Enters. v. Unemployment Comp. Bd. of Review, Commw. of Pennsylvania*, 773 A.2d 1018 (Pa. Commw. Ct. 2001) (an employee who quits after his employer had repeatedly delayed payment of wages acts with ordinary common sense in leaving his employment).

Similarly, in *Zablow v. Dep't of Employment Sec.*, 398 A.2d 305 (Vt. 1979), the Supreme Court of Vermont reversed an order from the Employment Security Board disqualifying a claimant from unemployment benefits on the ground that she had left her last employing unit voluntarily without good cause attributable to the employing unit. "Failure by the employer to pay plaintiff her wages when due, coupled with three or four prior late payment of wages, constituted good cause for plaintiff to leave and was attributable to the employer." *Id.* at 306. Likewise, in *Randolph v. New Mexico Employment Sec. Dep't*, 774 P.2d 435 (N.M. 1989), the Supreme Court of New Mexico held that delayed paychecks constituted good cause for the employee to quit her employment after a brief time. In that case, on three occasions the employee's paycheck did not arrive on time, and the employer asked her to delay cashing a paycheck on another occasion. "When an employer consistently fails to provide paychecks on established paydays to his or her employees, the employee has good cause to voluntarily quit employment." *Id.* at 438.

This approach in the area of unemployment compensation benefits is consistent with the approach taken by courts in other areas. In a case involving an employer's violation of the state's minimum wage act, the Court of Appeals of Washington held that "an employee has good cause to quit voluntarily when an employer does not pay statutorily mandated wages." *Martini v. The Employment Sec. Dep't*, 990 P.2d 981, 985 (Wash. Ct. App. 2000). Similarly, the United States Court of Appeals for the Ninth Circuit held that California state officials violated the Fair Labor Standards Act, 29 U.S.C.S. §§ 201-19, when, due to a budget impasse, they failed to issue state maintenance workers' pay checks on payday. The court stated that "[p]aychecks are due on payday. After that, the minimum wage is 'unpaid.'" *Biggs v. Wilson*, 1 F.3d 1537, 1544 (9th Cir. 1993).

These cases are consistent with the District of Columbia Court of Appeals' holding that in unemployment compensation benefits appeals, the determination of "good cause connected with the work" "is factual in nature, and turns on what 'a reasonable and prudent person in the labor market' would do under similar circumstances." *Cruz*, 633 A.2d at 70 (quoting 7 DCMR 311.5). I am persuaded that the weight of authority is that where, as in the instant case, an employer consistently fails to provide paychecks to his or her employee on established paydays, a reasonable and prudent person in the labor market would leave to seek a job where wages earned are consistently and regularly paid timely.³ The employee who is paid irregularly has good cause to voluntarily quit employment for purposes of eligibility for unemployment benefits. Therefore, I find that Claimant has met her burden of proving that she left her job for "good cause connected with the work." The Claims Examiner's Determination is hereby reversed and Claimant is eligible for unemployment benefits. D.C. Official Code § 51-110(a); § 51-111(e).

IV. ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, it is, this 2nd day of August 2007

ORDERED that the Claims Examiner's Determination is **REVERSED**; it is further

ORDERED that Appellant/Claimant E. T. is **ELIGIBLE** for unemployment benefits; it is further

³ This case does not involve an isolated incident of untimely payment of wages earned.

ORDERED that the appeal rights of any person aggrieved by this Order are stated below.

August 2, 2007

_____/S/
Jesse P. Goode
Administrative Law Judge